NOT TO BE PUBLISHED

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. PAUL ALLEN COOPER, Defendant and Appellant.	2d Crim No. 39186 (LASC No. A322057) Court of Appeal Second Dist. F I L E D Nov 10 1981 Clay Robbins, Jr. Clerk

APPEAL from a judgment (order granting probation) of the Superior Court of Los Angeles County, Carlos E. Velarde, Judge. Affirmed.

John N. Frolich for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant

Attorney General, S. Clark Moore, Assistant Attorney General, Robert F. Katz and Michael Nash, Deputy Attorneys General, for Plaintiff and Respondent.

By jury trial appellant was found guilty of forgery (Pen. Code, § 470). He was placed on probation for three years on the condition, among others, that he spend 60 days in county jail.

Brian Harvey, president of Alflex Corporation, hired appellant in November 1974 to be marketing manager for a subsidiary, Alflex Copper Foil, at a salary of $2,000 per month plus some incidental expenses, including an expense account. There was no written contract of employment. The company failed, and appellant was terminated after four months, but with strong recommendation for another job.

In the middle of July 1975 Mr. Harvey received a letter from the law firm of Kanarek and Berlin representing appellant. The letter stated that appellant had a written employment contract with Mr. Harvey and that if the matter was not resolved by payment of money, a law suit would be filed.

In August 1975 a verified complaint for breach of contract was filed and served on Mr. Harvey. The complaint alleged breach of a written employment contract purportedly entered on November 3, 1974, and stated that a true copy of the contract was attached to the complaint as exhibit A. The exhibit was a three-page contract of employment for a term of five years and bore the signatures of Brian L. Harvey and Paul Cooper at the end.

Mr. Harvey never signed a contract of employment with appellant nor authorizied his signature to be placed thereon.

Two handwriting experts testified for the prosecution that the signature on the contract was not that of Mr. Harvey.

Appellant testified on his own behalf that he and Mr. Harvey signed the contract on November 3, 1974, at the premises of the Alfex Corporation in Gardena. Two handwriting experts testified for appellant that the signature of Mr. Harvey on the contract was genuine.

There has been a previous appeal in this matter. In People v. Cooper, 83 Cal.App.3d 121, we reversed the trial court's order of dismissal pursuant to Penal Code section 995. We held that all the elements of forgery were established by the evidence at the preliminary hearing, that the forgery was uttered in Los Angeles County upon the filing of the civil complaint with a copy of the

contract attached as an exhibit, and that the original of the contract was lawfully seized by an investigator of the district attorney's office.

On this appeal appellant raises 10 contentions, none of which has merit.

SUFFICIENCY OF INFORMATION

Appellant contends that the statute under which he was charged, Penal Code section 470, does not technically constitute a crime because section 470 does not state the punishment for forgery. (See Pen. Code, § 15.) Appellant's argument is frivolous since the punishment for forgery is specified in Penal Code section 473. (In re Gohlke, 72 Cal.App. 536, 538.)

AMENDMENT TO INFORMATION

After issuance of the remittitur in the prior appeal the district attorney moved to amend the information with regard to the date of the offense. The information had previously alleged the date to be July 15, 1975, which was the date Mr. Harvey was contacted by appellant's lawyers about the purported employment contract. The prosecutor moved to change the date of August 13, 1975, the date of the filing of the civil complaint with a copy of the purported contract attached. There is no merit to appellant's contention that the court erred in amending the information. The court may permit an amendment at any time at the preliminary examination. (Pen. Code, § 1009.) The trial court did not err in refusing appellant's

request that a continuance be granted because of the amendment. Penal Code section 1009 provides that "the trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted. . . ." A change in the date on which the crime is alleged to have been committed does not require a continuance if the defendant was not actually misled or otherwise prejudiced by the date. (In re Newbern, 53 Cal.2d 786, 790.) Whether a defendant has affirmatively demonstrated that justice requires a continuance is a factual matter, and in the absence of abuse of discretion the trial court's

determination will be upheld on appeal. (People v. Witt, 53 Cal.App.3d 154, 164-165.) In this case it is apparent that appellant was not prejudiced by the amendment as to the date. Appellant's fully prepared defense was that the written contract of employment was genuine, which appellant supported with testimony of expert witnesses and others. The amendment as to the date did not affect his defense at all.

At this point we also discuss appellant's ninth contention, which is closely related to this issue. As we understand appellant's argument, he contends that the information which was under consideration in the prior appeal had the "wrong" date, and that therefore the dismissal under Penal Code section 995 should have been upheld. However, the time to raise

that contention was in the prior appeal. The information has since been amended, and properly so, and appellant has been duly convicted upon a jury trial. He suffers no prejudice from the alleged error in the original information.

RENEWED PENAL CODE SECTION 1538.5 MOTION

After issuance of the remittitur in the prior appeal appellant moved under Penal Code section 1538.5 to suppress as evidence the written contract, on the ground it was unlawfully seized without a warrant. That motion was denied on December 7, 1979. A writ was denied by the Court of Appeal and a hearing denied by the Supreme Court.

Just prior to trial appellant attempted to renew his motion. This is not permissible unless opportunity for

the motion did not previously exist or defendant was not previously aware of the grounds for it, as for example when there has been an intervening change in the applicable law. (Pen. Code, § 1538.5, subd. (h); People v. Superior Court (Edmonds), 4 Cal.3d 605, 611.)

Appellant contended in the trial court that the renewed motion was justified on the basis of a United States Supreme Court decision filed June 20, 1980, Walter v. United States, 447 U.S. 649. The trial court read appellant's points and authorities and the Walter case and concluded there were no grounds for a renewed motion. The trial court was correct. In Walter, FBI agents lawfully obtained possession of 12 large securely sealed packages containing 871 boxes of 8 millimeter film. The exterior of the boxes contained suggestive

drawings and explicit descriptions of the contents. The FBI agents displayed the films on a projector to determine if they were obscene. The court held that the proper seizure of the boxes of film did not authorize the examination of the contents without a warrant (the film itself, which could be viewed only on a projector).

This distinction between the seizure of a container and the examination of its contents was not new law. (See People v. Minjares, 24 Cal.3d 410, 421 fn. 6, 423; People v. Dalton, 24 Cal.3d 850, 858; United States v. Chadwick, 433 U.S. 1, 10; Arkansas v. Sanders, 442 U.S. 753, 758.) To the extent it was relevant, this distinction could have been raised at the time of the prior motion, and was not grounds for a renewed motion.

Furthermore, Walter was not persuasive authority in appellant's case, which did not involve a package and its contents, but a document in plain sight on a table in an office where the investigator had the right to be. (People v. Cooper, supra, 83 Cal.App.3d at pp. 130-131.)

INSTRUCTION ON BEST EVIDENCE

Appellant contends the trial court erred in refusing to give appellant's requested instructions that the rules of evidence in civil actions are applicable (Pen. Code, § 1102) and that except as otherwise provided by statute, no evidence other than the writing itself is admissible to prove the content of a writing. (Evid. Code, § 1500.) Appellant contends that he desired to argue to the jury that the copy attached to

the civil complaint was not competent evidence of an uttering.

This argument has no merit. The quoted rules relate to the admissibility of evidence, which was a question for the trial court, not the jury. Both the original contract and the civil complaint were admitted into evidence without objection. Moreover we held in the prior appeal that "[i]f the photocopying of the forged contract resulted in another forged instrument, the filing of the photocopy was the uttering of a forged instrument." (People v. Cooper, supra, 83 Cal.App.3d at p. 128.)

MOTION FOR NEW TRIAL

Appellant moved for a new trial based upon declarations by appellant and his counsel that after the trial they over-

heard or were told by several jurors that the handwriting evidence was inconclusive but that the jurors were influenced in their verdict by the terms of the purported written employment contract, which in their opinion would not have been agreed to by any employer in his right mind.

Respondent correctly points out that these declarations went only to the issue of the mental processes of the jurors, and therefore were not admissible to impeach the verdict. (Evid. Code, § 1150, subd. (a); People v. Hutchinson, 71 Cal.2d 342, 350; People v. Flores, 92 Cal.App.3d 461, 468.)

MOTION FOR COCOUNSEL STATUS

Prior to trial appellant personally addressed the court and attempted to

"appoint[ ] myself as co-counsel." The court properly denied the motion. Although a defendant has the right to counsel and the right to self-representation, he does not have a right to act as cocounsel with his attorney. (People v. Dale, 78 Cal.App.3d 722, 732; People v. Wheeler, 68 Cal.App.3d 1056, 1059; People v. Harris, 65 Cal.App.3d 978, 987.)

BAIL PENDING APPEAL

After the court made its order granting probation, which included 60 days in county jail, the court denied appellant's motion to suspend that condition. The court stated, "If you want to make a motion for bail on appeal, I will consider it. [¶] MR. FROLICH: Then I make a motion for bail on appeal. [¶] THE

COURT: I'll take it under submission. I will make my ruling on Friday. In the meantime, Mr. Cooper will be in custody. That will be the sentence of this Court." The court subsequently granted bail on appeal, which was posted by appellant, and he was released.

Appellant contends the bail motion should not have been taken under submission, since it resulted in appellant's serving two days in custody. He cites no authority which requires the court to rule immediately on a bail motion. (Cf. Pen. Code, § 1274, which requires that reasonable notice of a bail application be given to the district attorney.) In any event, the time taken by the court to decide the bail application is no ground for reversal of the judgment.

PLEA BARGAIN OFFER

At the sentencing hearing appellant offered to prove that prior to trial, during plea discussions with a different judge, that judge had indicated that if appellant pleaded no contest the judge would give a straight suspended sentence. Appellant asserted that the trial court could not give a more severe sentence than offered by the first judge, because that would be penalizing appellant for exercising his right to go to trial. The trial court stated it was not bound by the previous discussion, and that, unlike the previous judge, he had the opportunity to listen to the witnesses, including appellant, testify under oath.

Appellant's reliance on In re Lewallen, 23 Cal.3d 274, is misplaced. In that case the sentence had greatly

exceeded a normal sentence for like crimes and the trial court made a number of statements on the record which indicated it was penalizing the defendant for choosing to go to trial. (Id., at p. 277.) Although the Supreme Court reversed in that case, it cautioned that a defendant who goes to trial is not entitled as a matter of law to the same sentence he would have received had he pleaded guilty. In the absence of prejudicial remarks by the trial court, the mere fact that the sentence received by appellant was more severe than that offered by another judge is not sufficient evidence that appellant was penalized for going to trial. (People v. Szeto, 29 Cal.3d 20, 35.)

MOTION TO DISQUALIFY PROSECUTOR

Appellant moved to disqualify the district attorney on grounds of prejudice or conflict of interest. The basis of the motion was that an investigator from the district attorney's office was contacted by the attorneys for Mr. Harvey in the civil case; they showed the investigator the original of the written contract of employment, which had been turned over to them temporarily for discovery purposes; they arranged to invite the investigator to the deposition at which the contract would be turned back over to appellant's civil attorneys, and the investigator seized it there. (See People v. Cooper, supra, 83 Cal.App.3d at pp. 130-131.) Appellant speculates that the delay in seizing the document until the deposition

was to enable Mr. Harvey's attorneys to satisfy a condition of a stipulation in the civil case that they would return the document to appellant's civil attorneys. He argues this was improper, and that it raised inferences of prejudice or conflict of interest on the part of the district attorney.

There is no merit to this contention. No inference of prejudice or conflict of interest is reasonably supported by the extent of cooperation between the prosecutor's office and the victim in this case. (See People v. Partlow, 84 Cal. App.3d 540, 557.) The trial court did not abuse its discretion (People v. Superior Court (Greer), 19 Cal.3d 255, 269) in refusing to disqualify the district attorney.

The judgment (order granting probation) is affirmed.

ASHBY, J.

We concur:

STEPHENS, Acting P. J.

HASTINGS, J.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

JAN 13 1982

I have this day filed Order

HEARING DENIED

In re 2 Crim. *No.* 39186
People

vs.
Paul Allen Cooper

Respectfully,

APPENDIX "B"

Clerk

JOHN N. FROLICH
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original filed
2/10/82

Attorney for Defendant

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff/Appellee,
vs.
PAUL ALLEN COOPER,
Defendant/Appellant.

No. A 322057

NOTICE OF APPEAL FROM STATE COURT and RECORD ON APPEAL

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that PAUL ALLEN COOPER, the appellant above named, hereby appeals to the Supreme Court of

the United States from the final order of The Supreme Court of the State of California (affirming judgment of conviction), and denying a hearing on January 13, 1982.

This appeal is taken pursuant to 28 USC Section 1257, subparagraph 2.

Appellant was convicted of the crime of forgery in violation of Section 470, Penal Code of the State of California, imposition of sentence was suspended; conditions of probation included 60 days jail time.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following: (see attached list which is incorporated herein by reference).

III. The following questions are presented by this appeal:

1. Was the appellant (defendant below) denied due process of law in violation of the Fourteenth Amendment of the United States Constitution by the following:

A. The alleged penal statute (P.C. 470) which the appellant was accused of violating is not a criminal statute at all in that:

(1) It is vague and ambiguous;

(2) It does not comply with the State of California definition of a crime contained in Penal Code §15.

(3) No conduct is either forbidden or prohibited in Penal Code §470 and there is no penalty contained in said statute.

B. The trial court refused to comply with the law of the State of California and the United States in that it:

(1) Refused to conduct a hearing as required by Penal Code 1538.5 when it summarily denied defendant's motion to suppress evidence which also denied appellant's rights under the Fourteenth Amendment, U.S. Const.

(2) Permitted the trial district attorney to amend the criminal complaint over the objections of the defendant and after the jury had been sworn in but refused the defendant's request for a five-day continuance as required by California law and the Due Process provision of the 14th Amendment, U.S. Constitution.

(3) Refused to grant appellant (defendant) a hearing on his motion for a

new trial after several members of the jury had advised that in their deliberations of the case they never considered whether the document (employment contract) which the district attorney claimed was forged, actually was forgery.

(4) Denied appellant's (defendant) motion for a new trial summarily without the opportunity to present any evidence.

(5) Improperly gave appellant a greater sentence than appellant was offered in another court for a plea of "nolo contendere" and refused to hear the matter.

DATED: January 27, 1982

.....

JOHN N. FROLICH
Attorney for Defendant
Appellant

SUPREME COURT OF THE

UNITED STATES

(October Term, 1981)

No. .....

PAUL ALLEN COOPER, Appellant, vs. STATE OF CALIFORNIA, Appellee.	APPLICATION FOR EXTENSION OF TIME FOR FILING JURISDICTIONAL STATEMENT AND DOCKETING APPEAL.

ON NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(The court will please note that this document along with Appendices "A" through "C" was filed with the U.S. Supreme Court on or about April 10, 1982)

APPENDIX "D"

SUPREME COURT OF THE UNITED STATES

No. A-862

PAUL ALLEN COOPER,
Appellant

vs.

CALIFORNIA

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled case be, and the same is hereby, extended to and including May 15, 1982.

/s/
William H. Rehnquist
Associate Justice of
The Supreme Court

Dated this 14th day
of April, 1982

APPENDIX "E"

SPECIAL NOTE TO COURT:

The following documents were previously filed with the United States Supreme Court on or about April 10, 1982 with Petitioner's Application for Extension of time for Filing Jurisdictional Statement and Docket Appeal:

1. NOTICE OF APPEAL FROM STATE COURT, filed with the Clerk's office of the Court of Appeals, Second Appellate District on Feb. 10, 1982;

2. Order of the Supreme Court of California, dated January 13, 1982 and denying hearing;

3. Opinion of the Court of Appeal, of California, Second District, filed November 10, 1981, affirming judgment.

APPENDIX "F"